S & M Shopping Arcade Sdn Bhd v CH Williams, Talhar and Wong Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S 4–22–1039 OF 2003
TENGKU MAIMUN JC
14 JUNE 2007

Civil Procedure — Estoppel — Issue estoppel — Plaintiff filed an earlier suit against another party for breach of contract — Present suit against defendant was founded on breach of duty of care — Both cases arose out of same complaint — Contention that earlier suit did not affect defendant — Whether doctrine of issue estoppel precluded plaintiff from proceeding with current action

At the outset of the trial, the learned counsel for the defendant raised a preliminary issue to be decided by the court pursuant to O 33 r 5 of the Rules of the High Court 1980 that in the light of the findings and decision of YA Dato' Abdul Malik Ishak J in proceedings under reference of Kuala Lumpur Originating Summons No S6–24–2363–2002, the plaintiff was precluded from proceeding with the trial of this Suit No S4–22–1039–2003, as identical issues of fact and law or mixed fact or law arose from or dependent upon the same set of facts or evidence had been determined conclusively against the plaintiff in the said OS No S6–24–2363–2003. In respond to the preliminary issue raised by the defendant, learned counsel for the plaintiff argued that the issues before this court were different and had not been decided by Abdul Malik Ishak J. Learned counsel submitted inter alia that the parties before Abdul Malik Ishak J were the plaintiff and FLKH, which did not affect the defendant and the issue was whether the valuation report prepared by the defendant was binding and conclusive pursuant to the consent order entered into between the plaintiff and FLKH. Learned counsel for the plaintiff further submitted that before this court the issue was whether or not there was a duty on the valuer to the contracting parties and whether or not the valuer was negligent in coming to his determination. Those issues were not considered by Abdul Malik Ishak J.

Held, dismissing plaintiff's claim with costs:

(1) Although the case before this court was founded on breach of duty of care and the case before the learned judge Abdul Malik Ishak J was one on breach of contract, undeniably the two cases arose out of the same complaint ie the lettable area. Such was the situation, both cases would therefore arose out of identical facts and dependent on the same evidence (see para 8).

(2) Having read the judgment of the learned judge, the court found that the issues had been litigated and the learned judge had in fact considered those questions. The rights and liabilities of the plaintiff and the valuer ie the defendant, had merged into the judgment delivered by the learned judge in the earlier

proceedings and the judgment being final given the discontinuance of the notice of appeal to the Court of Appeal, the plaintiff should be estopped from proceeding with this action (see paras 9–10).

(3) Even if the submission of learned counsel for the plaintiff was to be accepted that the issues were not actually considered by the learned judge, the plaintiff was still caught by the doctrine of estoppel per rem judicatum as stated in the case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189. In the earlier proceedings where the plaintiff challenged the valuation report prepared by the defendant as being inaccurate, the defendant should and could have been brought as a party wherein the alleged breach of duty of care in preparing the valuation could appropriately be determined (see para 11).

[Bahasa Malaysia summary

Pada permulaan perbicaraan, peguamcara bijaksana defendan telah membangkitkan satu isu awalan untuk diputuskan oleh mahkamah mengikut A 33 k 5 Kaedah-Kaedah Mahkamah Tinggi 1980 memandangkan carian dan keputusan YA Hakim Dato' Abdul Malik Ishak di dalam prosiding-prosiding di bawah rujukan di Saman Pemula Kuala Lumpur No S6–24–2363–2002, plaintif dihalang daripada meneruskan dengan perbicaraan tindakan ini iaitu Saman No S4–22–1039–2003 oleh kerana isu-isu fakta dan undang-undang ataupun gabungan fakta dan undang-undang yang sama berbangkit daripada ataupun bergantung atas set fakta-fakta atau keterangan telahpun diputuskan secara konklusif terhadap plaintif di SP No S6–24–2363–2003 tersebut. Menjawab kepada isu awalan yang dibangkitkan oleh defendan, peguamcara plaintif menyatakan bahawa isu-isu sebelum mahkamah ini adalah berlainan dan masih belum diputuskan oleh Abdul Malik Ishak H. Peguamcara bijaksana menghujahkan antara yang lain bahawa pihak-pihak sebelum Abdul Malik Ishak J adalah plaintif dan FLKH, yang tidak menjejaskan defendan dan isu sama ada laporan penilaian yang disediakan oleh defendan adalah terikat dan konklusif mengikut perintah persetujuan diantara plaintif dan FLKH. Peguamcara bijaksana plaintif juga menghujahkan bahawa isu sebelum mahkamah ini ialah sama ada terdapat kewajipan penilai terhadap pihak-pihak yang mengikat kontrak dan sama ada penilai cuai dalam penemuannya. Isu-isu tersebut belum diputuskan oleh Abdul Malik Ishak H.

Diputuskan:

(1) Walaupun kes sebelum mahkamah ini adalah berdasarkan kemungkiran kewajipan berjaga-jaga dan kes sebelum hakim bijaksana Abdul Malik Ishak H adalah berdasarkan kemungkiran kontrak, ia tidak dapat dinafikan bahawa kedua-dua kes tersebut berbangkit daripada aduan yang sama iaitu kawasan yang dapat disewakan. Ini merupakan keadaan, kedua-dua kes dengan itu berbangkit atas fakta-fakta yang sama dan bergantung kepada keterangan yang sama (lihat perenggan 8).

(2) Setelah membaca penghakiman hakim bijaksana tersebut, mahkamah berpendapat bahawa isu-isu telahpun dibicarakan dan hakim bijaksana telah

sebenarnya telah mempertimbangkan soalan-soalan tersebut. Hak-hak dan liabiliti-liabiliti plaintif dan penilai iaitu defendan, telah digabung ke dalam penghakiman yang disampaikan oleh hakim bijaksana di prosiding yang awal tersebut dan penghakiman tersebut adalah muktamad memandangkan notis rayuan ke Mahkamah Rayuan telah diberhentikan, plaintif sepatutnya diestop daripada meneruskan dengan tindakan ini (lihat perenggan 9–10).

(3) Walaupun jika hujahan peguamcara bijaksana plaintif diterima bahawa isu-isu tersebut belum sebenarnya dipertimbangkan oleh hakim bijaksana tersebut, plaintif masih dihalang oleh doktrin estopel per rem judicatum seperti yang dinyatakan dalam kes *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189. Di prosiding awal tersebut di mana plaintif telah mempertikaikan laporan penilaian yang disediakan oleh defendan sebagai tidak tepat, defendan sepatutnya dibawa masuk sebagai satu pihak di mana kemungkiran kewajipan berjaga-jaga menyediakan penilaian yang dikatakan itu dapat diputuskan (lihat perenggan 11).]

Notes

For cases on issue estoppel, see 2(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2615–2625.

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (refd)
Nanang International Sdn Bhd v The China Press Bhd [1996] 6 CLJ 213 (refd)
North West Water Ltd v Binnie & Partners (a firm) [1990] 3 All ER 547 (folld)

Legislation referred to

Electricity Supply Act 1990 s 11(7), (10)
Rules of the High Court 1980 O 33 r 5

Gideon Tan (Gideon Tan Razali Zaini) for the plaintiff.
Varghese George (Zain & Co) for the defendant.

Tengku Maimun JC:

[1] At the outset of the trial, the learned counsel for the defendant raised a preliminary issue to be decided by the court pursuant to O 33 r 5 of the Rules of the High Court 1980 ('the RHC') as follows:

> In the light of the findings and decision of YA Hakim Dato' Abdul Malik Ishak in proceedings under reference of Kuala Lumpur Originating Summons No S6–24–2363–2002 reported in [2003] 3 CLJ 58, the plaintiff in this suit is precluded from proceeding with the trial of this Suit No S4–22–1039–2003 as identical issues of fact and law or mixed fact or law arising from or dependent upon the same set of facts or evidence have been determined conclusively against the plaintiff in the said OS No S6–24–2363–2003. The principle of issue estoppel under the doctrine of res judicata operated to preclude the plaintiff from attempting to obtain a conflicting or contradicting decision or from challenging the correctness of the decision delivered by a competent High Court in the said OS No S6–24–2363–2002. In any event relitigating the issues in this action would be an abuse of the process of court.

[2] Learned counsel for the defendant is relying on the issue estoppel. In support thereof learned counsel cited inter alia the case of *Nanang International Sdn Bhd v The China Press Bhd* [1996] 6 CLJ 213 wherein at 218 RK Nathan J said:

> The doctrine of issue estoppel has been given a wider construction and extended to preclude a party to a proceeding from re-litigating in a second proceeding identical issues of fact, law or mixed fact or law which have been determined against him in the earlier proceeding irrespective of whether the second proceeding involves different parties.

[3] In the case of *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 Peh Swee Chin FCJ said at p 200:

> There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such issues which might have been and which were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of res judicata, ie doctrine of estoppel per rem judicatum.
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> We are of the opinion that the aforesaid contrary view is to be preferred;... It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population;...
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> It is further necessary at this stage to understand the import of the words in the said famous statement, ie '…every point which properly belonged to the subject of litigation…' which Somervell LJ explained in *Greenhalgh v Mallard* [1947] 2 All ER 255 at p 257 as follows:
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> > ... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but… it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of court to allow a new proceeding to be started in respect of them.

[4] Learned counsel for the defendant prays that this Suit No S4–22–1039–2003 be therefore dismissed with costs.

[5] In respond to the preliminary issue raised by the defendant, learned counsel for the plaintiff argued that the issues before this court are different and have not been decided by Abdul Malik Ishak J. Learned counsel submitted inter alia that the parties before Abdul Malik Ishak J were the plaintiff and FLKH and the issue was whether the valuation report prepared by the defendant is binding and conclusive pursuant to the consent order entered into between the plaintiff and FLKH. Learned counsel submitted that it does not affect the defendant herein.

[6] Learned counsel for the plaintiff further submitted that before this court the issue is whether or not there was a duty on the valuer to the contracting parties and whether or not the valuer was negligent in coming to his determination. More specifically learned counsel argued that the issues before this court would be whether the defendant actually go to the site; whether they look at plan to ascertain lettable area; whether the valuer acted impartially in coming up with valuation. Those issues, contend learned counsel were not considered by Abdul Malik Ishak J.

[7] In the case of *North West Water Ltd v Binnie & Partners (a firm)* [1990] 3 All ER 547 at p 559 Drake J said: **A**

> It was said that the issues in the county court action and the issues in the present action were not the same because in the county court action the matter in issue between Miss Elsworth [the passenger in D's car] and the two defendants to that action was whether or not there had been a breach of their respective duties towards her, whereas in the present action the question was whether there had been a breach of the duties: (i) owed by the defendant to the plaintiff, and (ii) owed by the plaintiff to the defendant. Those are different legal issues of course, in a sense, but I do not feel that the fact that they are technically different should prevent effect being given to the plea of estoppel in a case where, having examined the pleadings in the county court action and compared them with the pleadings in the present action, I am satisfied that the issues of fact, and the evidence to support them, would be identically the same... **B** **C**

[8] I respectfully endorsed the above cited statement. Although the case before me is founded on breach of duty of care and the case before the learned judge Abdul Malik Ishak was one on breach of contract, undeniably the two cases arose out of the same complaint ie the lettable area. Such is the situation; both cases would therefore arise out of identical facts and dependent on the same evidence. The question to be asked is, have the issues in fact, in practical terms, already been litigated by Abdul Malik J? **D**

[9] Having read the judgment of the learned judge, I found that the issues have been litigated and the learned judge had in fact considered those questions wherein he said at p 76 of the judgment that '..the valuer had inspected the premises and so the valuation report was not something that was snapped up in the air'. At p 77 of the judgment the learned judge said: **E** **F**

> …because the valuer clearly did not presume those measurements of the rentable area to be correct but rather the valuer had taken the necessary steps to:
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> (i) visit the said premises …; and
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> (ii) verify the computation of the rentable area by relying on the letters from the Quantity Surveyor …. **G**

[10] The rights and liabilities of the plaintiff and the valuer ie the defendant herein in my view, had merged into the judgment delivered by the learned judge in the earlier proceedings and the judgment being final given the discontinuance of the notice of appeal to the Court of Appeal, the plaintiff in my view should be estopped from proceeding with this action. **H**

[11] Quite apart from the finding made by the learned judge above, there is another aspect of issue estoppel which ought to be considered here i.e. whether such issues as submitted by learned counsel for the plaintiff are issues which might have been and which were not brought forward in the earlier proceedings before Abdul Malik J. To my mind those issues should have been brought in the earlier proceedings and hence even if the submission of learned counsel for the plaintiff is to be accepted that the issues were not actually considered by the learned judge, the plaintiff is still caught by the doctrine of estoppel per rem judicatum as stated in the case of *Asia* **I**

A *Commercial Finance*. In the earlier proceedings where the plaintiff challenged the valuation report prepared by the defendant as being inaccurate, the defendant should and could have been brought as a party wherein the alleged breach of duty of care in preparing the valuation could appropriately be determined.

B **[12]** In the circumstances I upheld the preliminary issue raised by the defendant and dismissed the plaintiff's claim with costs.

Plaintiff's claim dismissed with costs.

C Reported by Sally Kee

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